IN THE CIRCUIT COURT FOR THE
11TH JUDICIAL CIRCUIT IN AND FOR
DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 00-03153 CA 32

SUZETTE A. JANOFF,

Plaintiff,

vs.

COPY

PHILIP MORRIS INCORPORATED,
("PHILIP MORRIS U.S.A."),
R.J. REYNOLDS TOBACCO COMPANY,
LORILLARD TOBACCO CO., and
BROWN & WILLIAMSON TOBACCO CORP.,
Individually and as Successor
to THE AMERICAN TOBACCO COMPANY,

Defendants.
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VOLUME 6

PROCEEDINGS BEFORE THE
HONORABLE LESLIE B. ROTHENBERG
on Monday, August 26, 2002
10:15 a.m. to 12:40 p.m.

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APPEARANCES:

SHOOK, HARDY & BACON, L.L.P.
2400 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131-4332
Phone: (305) 358-5171
By: KENNETH J. REILLY, ESQ.
DANIEL F. MOLONY, ESQ.
Attorneys for Defendant Philip Morris Inc. and Lorillard Tobacco Co.

ANGONES, HUNTER, McCLURE, LYNCH, WILLIAMS & GARCIA, P.A.
9th Floor, Concord Building
66 West Flagler Street
Miami, Florida 33130
Phone: (305) 371-5000
By: STEWART D. WILLIAMS, ESQ.
STEVEN HUNTER, ESQ.
MARVIN WEINSTEIN, ESQ.
Attorneys for Plaintiff

ADORNO & YOSS, P.A.
2601 South Bayshore Drive, 5th Floor
Miami, Florida 33131
Phone: (305) 860-7052
By: ANTHONY N. UPSHAW, ESQ.
Attorneys for Brown & Williamson Tobacco Corp., individually and as Successor to the American Tobacco Company

WOMBLE, CARLYLE, SANDRIDGE & RICE, L.L.P.
200 West Second Street
Winston-Salem, North Carolina 27101
Phone: (336) 721-3600
By: NEIL KODSI, ESQ.
Attorneys for Defendant R.J. Reynolds Tobacco Company

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I N D E X

PAGE:LINE

VIDEOTAPED TESTIMONY OF
JULIUS RICHMOND, M.D.....718:18

VIDEOTAPED TESTIMONY OF
CARR SMITH, Ph.D.....785:10

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PROCEEDINGS

- - -

THE COURT: This is the case of Suzette Janoff versus Philip Morris et al., case number 003153. Note for the record presence of counsel for the Plaintiff and counsel for the Defendants.

We had a few issues to resolve before we begin with the jury this morning.

Beginning with the fact, I have the objections and rulings on Dr. Thomas Houston.

Actually I should be filing one with the Court, so I'm going to save one.

And the next one is the Defendants' objections to the Plaintiff's direct examination of Mariel Stroschein.

Next are Plaintiff's objections to cross examination of Dr. Stroschein.

And finally the Defendants' objections to Carry Berdi's testimony.

The second issue would be Defendants' objection -- actually the memorandum of law provided by the defense regarding the Plaintiff's contacts with the Defendants' experts, which for the record, involves a letter

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sent by the Plaintiff to the Defendants' experts informing them that the Plaintiff intends to ask them during cross examination if they testify as to how much money they've received in compensation for their services regarding this case and other tobacco cases; is that correct?

MR. HUNTER: Yes.

THE COURT: Have you had an opportunity to review the memorandum of law?

MR. HUNTER: Yes.

THE COURT: Do you wish to respond?

MR. HUNTER: Only that I didn't think it applied and I don't think they have come up with any reason why anything I did was inappropriate. And I would further say that that specific letter was sent to the witness in the Lukacs versus Philip Morris case and Judge Dean allowed me to cross examine their witness from that letter.

MR. UPSHAW: First thing, it was Judge Donner not Judge Dean.

THE COURT: That doesn't really answer the issue.

MR. UPSHAW: That's neither here nor there.

The only reason he was allowed to answer in

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response to that letter was it had to do with the cross examination. The reason that information was allowed because the witness had not responded to that information during their deposition. So I thought correctly, Judge Donner said, well, if they didn't respond, then obviously you can ask that information on the stand.

THE COURT: Let's not address some other judge's ruling.

MR. UPSHAW: This is my problem about this letter. They sent another letter even while this issue was before you, another letter recently to Robert Gould, who is a witness that we've identified.

Now, we had Mr. Gould available to be deposed last week. He was the pilot you told us to put up on Wednesday. We put him up at 1:00, an hour before the deposition was supposed to take place. They cancelled.

Now, they could have asked him every single one of these questions last week, yet they chose not to do it pursuant to the Florida Rule of Civil Procedure, which says the only way you get information from an expert is by X, Y and Z.

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THE COURT: That's not how I read the rule, frankly. I've reviewed the rule, which is Rule 1.280, subsection 4, which deals with the trial preparation of experts. I don't read the rule that way, frankly.

MR. UPSHAW: I was looking at the language that says, you will get information from experts the following ways.

None of them says by a letter prior to trial which asks for information that you could have received --

THE COURT: I understand, but what it says is you may get information -- you may only get information by the following, which is I, that deals with interrogatories. II -- excuse me, I, which deals with interrogatories. II, which deals with additional interrogatories and depositions. And III, which says: A party may obtain the following discovery regarding any persons disclosed by interrogatories or otherwise as a person expected to be called as an expert witness at trial. And then lists four separate areas; including the compensation for their services.

So in III it does not say that you must

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obtain this information through interrogatories and depositions. It says you may obtain, and it didn't limit how you obtain this information. So I don't really read the rule that way.

MR. UPSHAW: Do you realize the havoc that would cause if you allow anyone to send letters to anyone they wanted to?

THE COURT: I could certainly understand if this was an ex parte communication where they're asking for information to be sent to them. Give me this information, respond to this question in writing, orally, if they were to do that. I can understand why that would be improper. But when you submit a letter to somebody that puts them on notice simply does nothing but to put them on notice that this is an area of inquiry that you intend to get into during cross examination. I don't see that as an ex parte communication. Especially since they also copied the defense counsel so that they know what the information is and they're receiving no information back from the witness.

I don't see anything improper about it. I do agree with you that the better way to get this would be drew interrogatories and

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depositions well in advance of the trial, to do a subpoena duces tecum if they wanted to get this information. That's probably a more appropriate way to do it. But frankly, I don't see anything improper.

MR. UPSHAW: Judge, what this does is it intimidates every one of our witnesses.

THE COURT: To intimidate them, to put them on notice of a question they're going to ask them in court? If they can ask them those questions in court and it's a proper area of inquiry, then to simply put them on notice --

MR. UPSHAW: It's not just notice, what we asked for in our memo is they intend to try to use this letter as to why you didn't send it. There's no requirement by the expert to bring this information or answer any differently --

THE COURT: They should be able to answer that question other than to hide behind the fact --

MR. UPSHAW: They shouldn't be intimidated to say, you must bring this information. I understand if it was by subpoena. And it wasn't. You see some of the letters in there not following what Mr. Hunter had said earlier.

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There are some letters that he sent to people in the state of Florida, which he could have put under subpoena.

THE COURT: I don't think this letter actually says you must bring. I'll take a look at it.

That's not my recollection of what the letter says. He says, I'm making this request in the interest of justice so that the ladies and gentleman of the jury...to let you know in advance of the questions that will be asked. Often witnesses do not have this information in hand when they come to court. Accordingly, I'm writing this letter to you so you will have adequate advance notifications that you will be asked this information in court. Therefore, I am requesting that you take whatever steps are necessary to completely provide questions concerning the subject matters in question.

It's not demanding and he's not saying you must bring. He's saying I'm putting you on notice that I'm going to ask you these questions. And I'm requesting that you be able to answer these questions.

MR. UPSHAW: And he intends to cross

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examine on that letter, which he shouldn't be allowed to do.

THE COURT: I disagree. So the objection is overruled.

The next area that I want to address is the Defendant's objections to the testimony of Dr. Stroschein without having a Frye hearing. I know that prior to the trial the defense had requested Frye hearings on a number of witnesses. They were never, ever identified, but the Court previously denied the Defendant's request for a Frye hearing.

It's this Court's opinion that this objection really goes to that issue. And I'll address it specifically as it relates to Dr. Stroschein.

Dr. Stroschein is a treating physician. The Court is going to deny your motion for a Frye hearing on the following grounds: First of all, the settlement agreement itself avoids the necessity of having a Frye hearing for any expert that's going to be testifying as to whether or not tobacco smoke can cause chronic sinusitis. That's already presumed by the evidence presented in the first trial.

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If the defense wishes to rebut that evidence, they have the ability to do so. But since it's been established through the other trial, no Frye hearing is necessary.

Secondly, Dr. Stroschein is the treating physician and she testified that she does have knowledge concerning this -- concerning people who do have reactions to secondhand tobacco smoke and specifically those who develop chronic sinusitis. She treats those people regularly within her office.

She has made the correlation that the Plaintiff's symptoms and condition was caused by secondhand smoke, which is her diagnosis.

I know that the defense has objected to the methodologies of her diagnosis in that she apparently reached her conclusion in part by eliminating other potential causes of her conditions.

This is not a new or novel science or methodology. It's commonly and routinely used by physicians all over the country. You go to your physician, they rule out other possibilities that would cause the same symptoms and the same conditions and they come to a

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conclusion.

I'm going to deny your request for a Frye hearing and simply state that if you don't believe that her conclusions are sound, that you may obviously attack that on cross examination. But it goes to the weight of the evidence as opposed to the admissibility of the evidence.

MR. REILLY: I understand your ruling, Your Honor. Just to clear up one point, the Frye hearings that we requested related to Dr. Stroschein and Dr. Casiano. We filed motions on both of those, and since they're not bringing Dr. Casiano, obviously the one on Casiano is moot. I think Your Honor indicated the other day, you had already indicated your interpretation of how the settlement agreement interacts with Frye. We've already voiced our argument on that and Your Honor has rejected that.

THE COURT: I didn't know whether I had a definitive ruling or whether -- since this notebook of the Defendants' objections was delivered after my ruling, I wasn't sure whether this was an additional objection or whether or not this was just to preserve the record.

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MR. REILLY: I don't know whether you made a definitive ruling or not.

THE COURT: Well, I have now.

MR. REILLY: Thank you, Your Honor.

Just so, maybe I should say this just so there's not confusion. The elimination of other causes really relates to a different area of the argument. But I understand that Your Honor has rejected all the arguments we've made in this regard.

THE COURT: Correct.

One additional item that was left over from last week was the Defendants' objections to the document that the Plaintiff wishes to introduce through the testimony of Carr Smith. And for the record that is the Broin Exhibit 105. It looks like it's marked now as Plaintiff's 1-D for identification. And it is the -- the title of it is The Smoking and Health Program, a critical and objective appraisal of --

MR. KODSI: I think it's "problem."

THE COURT: It's hard to read. Yes.

Do you wish to make an argument on that issue?

MR. KODSI: Your Honor, I just simply state

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that this is a document that came from Reynolds' files dated 1962. It's not self-authenticating. Mr. Rodgman or Dr. Rodgman has not been deposed in this case. And really the most important argument here is that that document bears no relevance on the facts of this case. It is a review of the literature on cigarette smoking and lung cancer with some mention of heart disease. It says nothing about sinus disease, sinusitis or anything to do with the sinuses. It is strictly a document in which Dr. Rodgman provides his employer with a review of what the state of the art literature is on smoking and lung cancer.

And I'm not sure how -- I'm very curious to hear Mr. Hunter articulate a relevance argument as to how this document bears any relevance to this case.

THE COURT: Mr. Hunter.

MR. HUNTER: Yes, Your Honor, may it please the Court. This document is on the RJR web site. And pursuant to the Master Settlement Agreement with the Association of Attorneys Generals, this is one of the documents that they were required to post. It is

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self-authenticating because it is an admission. And it is on their web site. And this it is their document. And it is an ancient document, because it is more than 20 years old. The case that states that documents on the web site are admissible is Van Westerenen, W-E-S-T-E-R-E-N-E-N, which is a United States District Court case found at 94 Sub Fed 2d 1087. Admissible from the web site as admissions of the party opponent under the Federal Rules of Evidence. This document was received in evidence on the Broin case and I have for the Court's perusal volume 95 of the transcript, page 11996, at which time Mr. Whiting, on behalf of the Defendants objected on essentially the same grounds that counsel has today. This document was admitted. And if the Court would like to peruse that transcript.

I also have asked Mr. Rosenblatt to be here today because when the original objection was made concerning this there was reference as to how these documents come into evidence and do you need the author? In fact, you don't need the author. This is a critical document, as Mr. Rosenblatt stated in the original Broin case.

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But also, I'll restate, this document shows that as early as 1962 the Defendants were aware of the fact that they manufactured not only cigarettes, but a distinct entity, and that being cigarette smoke. And it goes to notice as early as 1962 that cigarette smoke had been a target of a host of studies relating it to ill health. And that the majority of those studies incriminate cigarette smoke from a health standpoint. So it goes to notice, it goes to the acceptance by the Defendant of cigarette smoke as a distinct entity from the product.

And more importantly, it also goes to the admission of a duty to investigate and be knowledgeable. Because in the second to last paragraph it says: "This company -- what this company sells is cigarette smoke. And to maintain our first place position against any eventuality, we should be first in acquisition of information concerning the composition and physiological effects of cigarette smoke."

So it acknowledges the duty to be informed concerning the physiological effects of the smoke. So therefore, on three separate bases it goes to notice. It's an admission that the

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smoke is dangerous. And it goes to the admission that there's a duty to be knowledgeable concerning it. So it's relevant on all three of those grounds. It's self-authenticating. And it's an admission. And it's been received in the genesis of this lawsuit and should be received in this case.

THE COURT: Thank you.

Mr. Kodsi.

MR. KODSI: Yes, how I respond to that is I've met Dr. Rodgman. If you read the document what he's saying is the very -- it's a straightforward wording. We don't sell cigarettes to the smoker, we sell the smoke in there. It's got to taste good. We've got to research the health issues with regard to lung cancer, heart disease.

THE COURT: The whole memo is not about lung cancer and heart disease. Specifically they talk about the carcinogens and the other things that are found within the cigarette smoke. And specifically they talk about ciliary paralysis, which obviously would go to the cilia within the nose, which is a part of this litigation. And that specifically is mentioned

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in this document two or three times.

MR. KODSI: If you could refer me to the page. I believe the cilia paralysis section there is talking about cilia paralysis as it relates to lung cancer. Because that was one of the early theories --

THE COURT: Pathological data, that begins on page 3, but the cilia paralysis is on page 4, subsection C. Whole cigarette smoke and some of its constituents, and they named those, cigarette smoke collects at cilia-free areas and at areas of paralyzed cilia. And it goes on, contradictory evidence indicates the following: A, the above described cellular changes can be caused by previous respiratory changes to influenza, pneumonia.

It's hard to read this.

Pulmonary something, I can't read it, and by illnesses like urenia and vitamin deficiency. These don't go to long cancer and heart disease.

MR. KODSI: They don't go to sinusitis either.

THE COURT: They can.

MR. KODSI: There's going to be no connection in this case between this document

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and the diseases that are relevant to this case. The cilia paralysis talked about in this document is cilia paralysis that came out in the '40s and '50s of cilia paralysis in the lungs and pulmonary system. There's no evidence in this document that they're talking about cilia paralysis in the sinuses.

The primary focus of this document was a literary review in the 1960s as it relates to smokers. There's nothing in this document talking about secondhand smoke, cigarette smoke. The reference is references to cigarette smoke in this document are specific references to what smokers inhaled when they smoked cigarettes.

THE COURT: That's not correct. It says these changes are observed to a degree in infants and in nonsmokers. There's several references.

MR. KODSI: Your Honor, that's an epidemiological comparison between nonsmokers and smokers, not nonsmokers exposed to secondhand tobacco smoke, what we're doing in epidemiology in order to study the health effects of smokers. You compare smokers who smoke the products with nonsmokers, period.

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This discussion that you're referring to there is not talking about nonsmoker.

THE COURT: I'll refer you to page 7. The evidence to date. Obviously the amount of evidence accumulated to indirect cigarette smoke as a health hazard is overwhelming.

MR. KODSI: To indict, that's not direct, that word is indict.

THE COURT: Well, my copy is very unclear. To indict cigarette smoke as a health?

MR. KODSI: Yes, that quote has been used quite frequently in other smoking litigation involving smokers and lung cancer.

THE COURT: I did see several references to nonsmokers.

MR. KODSI: But those are not nonsmokers exposed to secondhand smoke, Your Honor, again, those are references to nonsmokers because that's how epidemiology is done. It compares smokers who smoke the product with nonsmokers and compares the relationship in the lung cancer incidents between a smoker and lung cancer incidence between a nonsmoker. Those are not discussions of nonsmokers exposed to secondhand tobacco smoke.

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Your Honor, the fact that we're engaging in this conversation is what concerns me about a document like this going to the jury, because they're not going to have any witness who can explain this document to the jury.

It's very easy to take things in this document out of context. And the bottom line of this document is that it doesn't relate to the issues that are in this case. There's nothing in here about sinus disease, sinusitis, there's nothing in here about secondhand smoke. It is literally just a literature review done in 1962 about smoking and health situation.

Now, another thing is, Your Honor, they only showed the first page of this document to Dr. Smith and did not give Dr. Smith an opportunity to respond on the rest of the document. Allowing the whole document to come into evidence now without a response from a witness makes no sense. And allowing just the first page to come in would be unfair and prejudicial.

If they wanted to show the entire document to Dr. Smith in his deposition, ask him questions about it, they had that opportunity.

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They didn't take that opportunity, so neither the whole document nor the first page alone should come in.

Also I'll make one more point, Your Honor, which goes to the deposition of Carr Smith and how this document is coming in. You have already ruled on the page and lines from the Carr Smith deposition, Your Honor, but one of the things you haven't addressed yet, and I'm only assuming from your page and line rulings where you might be headed on this, is they did not provide the Carr Smith deposition to us until after we asserted our Fabre affirmative defense on American Airlines.

This was taken in another case. It was not taken in this case. It was taken in a case where I believe sinusitis was in the complaint, but it wasn't an issue that was being pursued by the Plaintiffs so there was no reason for us to do any redirect on the sinusitis issue when Dr. Smith was deposed. And again, there's nothing in Dr. Smith's deposition that's relevant to our Fabre affirmative defense on American Airlines. They've known about Dr. Smith's deposition since it was taken in

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2001, I believe. February 26, 2001, a year and a half ago. It was never listed as a deposition to be played in this case until two or three weeks ago. And it says nothing about the airlines. It says nothing about our Fabre affirmative defense, so there's really no reason for this deposition or the document that's in it to come in this case.

MR. HUNTER: Judge, they're just rearguing this. You've already ruled on Carr Smith's deposition, gone through page and line.

THE COURT: I remember that the defense had objected to the testimony of Carr Smith in its totality. And I don't know whether I actually ruled on that last week or not.

MR. KODSI: You reserved on that, Your Honor. I think you were flooded with so many depositions to do page and lines. If you ruled, I apologize for reargument. It was my impression that you did not rule.

THE COURT: I don't have my notes with me on that issue. I know I had mentally decided to overrule your objection because I had ruled on the line designations, so I obviously was going to overrule your objection to admit his

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testimony. I must have found something in it that was relevant to this litigation and specifically to the defense, the affirmative defense raised a couple of weeks before trial. Without having it in front of me, though, I can't really be more specific.

MR. HUNTER: I have it here if you want to rereview it.

THE COURT: It's not going to have any of my notes.

MR. KODSI: I will represent to you, and I think Mr. Hunter will agree, that the only reference to the airlines is where Mr. Hunter asked Dr. Smith if he was familiar with activity within the airlines, and the witness said no.

THE COURT: But that wasn't what made the testimony relevant. And I can't recall the testimony well enough to recall why I found it was relevant to the litigation.

MR. HUNTER: The obvious relevance from our standpoint, Your Honor, is this was a recognition by the company, we take a position the cigarette smoke is cigarette smoke. And the only difference between its affect on a secondhand smoke person is in lower

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concentrations.

THE COURT: I do recall now, it had to do with the comparative negligence of the tobacco companies versus the airline industry.

MR. HUNTER: Yes. This was a recognition as early as 1962 that they need to study the physiological effect of cigarette smoke, they need to be on the forefront of it. And they distinguish it from cigarettes. And they admit that cigarette smoke -- and this is only related to cigarette smoke. And that's why it's relevant. That's why I cross examined Dr. Carr on it. All of counsel's evidence goes to the weight of it.

If Dr. Carr tried to explain, the jury will get to see that and evaluate it. But this is a critical document on the common law issue of the negligence of the manufacturer of this product which makes cigarette smoke.

THE COURT: As I recall, the basis of my ruling was the fact that this goes to the specific affirmative defense that someone else is responsible in part or in full for the illness that the Plaintiff suffers, specifically the airlines. And it is going to require a

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comparing of the negligence of the parties.

MR. KODSI: May I respond to that briefly? Comparative fault has always been in this case.

THE COURT: Comparative fault between the Plaintiff and the Defendants, not between the Defendants and American Airlines.

MR. KODSI: Well, in order, but what you have just explained as far as the relevancy and what Mr. Hunter has explained as far as the relevancy of Carr Smith's deposition would have been relevant to go to the Plaintiff just as equally.

THE COURT: Relevant testimony just like it might have been an affirmative defense that you could have raised three years ago. But you raised it three weeks ago and therefore the Plaintiff has re-evaluated their case and the defenses of this case and have now decided that the Carr Smith deposition is relevant and important to their case. So I'm going to allow it. I find that it is admissible and it does have relevance to the litigation of this case.

MR. KODSI: And your ruling of the Rodgman document?

THE COURT: That's also admissible.

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MR. KODSI: I would request, although I'm caught between a rock and a hard place, that you only allow the first page --

THE COURT: No, if you wish to cross examine or do something else with this document, you have a right to call Carr Smith. Even though his testimony is being shown by videotape deposition, you have a right to call him and ask him about other areas.

MR. KODSI: Since the Plaintiffs only showed him the first page and I don't have Dr. Smith, then I would ask only one page be shown.

THE COURT: Denied.

MR. HUNTER: Your Honor, may I be excused, I have a hearing before another judge. Do you mind if I leave?

THE COURT: How long do you expect the videotape will take?

MR. HUNTER: I believe it will go all the way to lunch.

THE COURT: And that's the first witness .

MR. HUNTER: Yes, Julius Richmond and if it ends before you decide you want to break for lunch, we'll plug in the Carr Smith.

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MR. WILLIAMS: What time does Your Honor wish to take lunch today?

THE COURT: About 12:30.

MR. HUNTER: Then we'll show the Carr Smith deposition. And I would ask, judge, at that time to publish the document to the jury.

THE COURT: I'll note that there is a standing objection by the defense as to both the testimony and the document.

Let's bring the jury in.

MR. UPSHAW: Your Honor, while Gary is getting the jury, I don't know who the witness is going to be this afternoon. If Mr. Brown is going to be this afternoon, we have a motion and argument which you reserved on before he was called. The motion was to preclude him from testifying based upon several issues. We said if and when they call him we were going to bring that up. Just didn't have time this morning.

THE COURT: I'm not familiar what the objections are going to be. Have you already raised them?

MR. UPSHAW: They've been filed --

THE BAILIFF: Rise for the jury, please.

(Jury enters courtroom.)

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THE COURT: Good morning and welcome back. You may be seated. Let the record reflect the presence for counsel for the Plaintiff, counsel for Defendants and the jury is now in the courtroom.

You may call your first witness.

MR. WILLIAMS: Your Honor, at this time the Plaintiff will call Julius Richmond by videotape.

THE COURT: We're going to try it with the lights on, if it's difficult for you to see it, we'll turn the lights off.

Also, while the videotape is playing, I'm going to not be here since I've already reviewed it and ruled on all the objections. So I hope you'll excuse me. I'll get some other work done.

(Videotaped testimony of Dr. Julius Richmond, MD, was played as follows:)

Will call as their first witness Dr. Julius Richmond.

Q. Dr. Richmond, please tell the ladies and gentlemen of the jury your full name and your present professional address.

A. I'm Dr. Julius B. Richmond. I am

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currently Professor Emeritus of health policy in the Department of Social Medicine at the Harvard Medical School at 641 Huntington Avenue, in Boston.

Q. Now, Dr. Richmond, at one time you were Surgeon General of the United States of America; is that correct?

A. That's correct.

Q. And when was that?

A. That was from 1977 to 1981.

Q. How does one become Surgeon General of the United States in terms of the appointment process; how does that work?

A. Well, ordinarily the President of the United States, through the secretary of the Department of Health and Human Services selects the best person that they can find from around the country and nominates that person to the Congress. And that's a presidential appointment and requires confirmation by the Senate.

Q. So, in other words, after the appointment -- and the President of the United States during your tenure in office was who?

A. Jimmy Carter.

Q. And who was the -- I guess back then it

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wasn't called the Department of Health and Human Services, it was called the Department of Health, Education and Welfare?

A. That's correct.

Q. Who was the secretary during your tenure of the Department of Health, Education and Welfare?

A. Joseph A. Califano.

Q. So after you were appointed by President Carter, did the United States Senate have to confirm you after hearings?

A. That's correct.

Q. And obviously you were confirmed?

A. That's correct.

Q. Now, in addition to your role and title as Surgeon General of the United States, did you have any additional designation in terms of your role with the federal government?

A. Yes, I was also the Assistant Secretary for Health in the then Department of Health, Education and Welfare, which is also a presidential appointment requiring confirmation by the Senate.

Q. To your knowledge, had anyone before you or any Surgeon General since held that dual

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appointment, where you were both Surgeon General and Assistant Secretary for Health?

A. No, I'm the only one that held those positions concurrently. Although there is a proposal currently to again put these positions together.

Q. I am, during the course of my questioning you, obviously going to go through your curriculum vitae beginning with medical school and taking you through your training.

But let me ask you this: What was your position and what medical school were you affiliated with at the time you were appointed to become Surgeon General of the United States?

A. I was a faculty member of the Harvard Medical School in the Harvard School of Public Health.

Q. Who notified you that you were under consideration or were being considered for the appointment as Surgeon General?

A. Well, I hadn't been aware of the fact that I was being considered until I received a call from Mr. Califano asking if I would come to Washington to talk with him. Having served in Washington in an earlier point in my career, I

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didn't take such calls lightly. So I responded.

Q. This is not a job you in any way campaigned for, I take it?

A. No, I was not anticipating this.

Q. Dr. Richmond, at one time you were the director of the federal Head Start Program; is that correct?

A. That's correct.

Q. Tell us -- first of all, what was, what is the Head Start Program?

A. The Head Start Program is a national program for preschool children, particularly those living in poverty. And as part of the programs of the Office of Economic Opportunity, the War on Poverty, when that was established in 1965, I was invited by the director of the Office of Economic Opportunity, Mr. Shriver, to come to direct that program. It's a comprehensive program that involves educational opportunities for preschool children. And it's comprehensive because it includes health and dental care, nutritional services as well as social services, parent involvement. And that program in the first summer, when we organized it in 1965, served about 500,000 poor children

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and continues to do so at the present time.

Q. A half a million children?

A. About a half million children. About 15 million children have passed through that program since it was established in 1965.

Q. What was it about your background and areas of expertise in medicine that qualified you to be director of the Head Start Program?

A. Well, I was serving as professor of pediatrics at the Upstate Medical Center in Syracuse, New York at the time. And I have had a long interest in studying the development of young children. And as part of some of my studies of young children, we noted that some of them, if they were not in favorable environmental circumstances, didn't develop as well, they didn't follow the usual developmental projectory. So with one of my colleagues Dr. Betty Caldwell, a psychologist, we developed an intervention, what we called an intervention program, a program for young preschool children to see if we could prevent that decline. And we demonstrated that we could prevent it.

And fortuitously, the Office of Economic Opportunity was established at that time. And I

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was on the basis of that work, invited to come to Washington to see if we could develop this nationally.

Q. Was that your first official job in Washington as part of the federal government?

A. Yes.

Q. And that began in 1965?

A. '65.

Q. Which would have been during the Johnson Administration?

A. That's correct.

Q. Now, let me back up a little and take you through your medical education background and training. And obviously I'm just going to hit some of the highlights.

You became a medical doctor; got your MD degree in what year?

A. 1939.

Q. And from what institution?

A. The University of Illinois, College of Medicine in Chicago.

Q. Now, at that point in time, did a physician who finished medical school, graduated medical school, got his MD degree, what was necessary for you to do in terms of any

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internship or residency?

A. Well, in those days we served a rotating internship. There were no specialized internships at that time. So I served that internship at the Cook County Hospital in Chicago for a year and a half.

And then was a pediatric resident to receive my specialty training in pediatrics at that hospital. That was interrupted by a period of service as a flight surgeon in World War II from 1942 to 1946.

And then I came back, resumed my training and then became certified as a pediatrician.

Q. Now, you say you became certified, you mean board-certified as a pediatrician?

A. The American Board of Pediatrics.

Q. Please explain to the jury how that works when someone completes a residency, a physician decides to specialize in a given area of medicine, what process must you go through before you become board-certified and what is the significance of being board-certified?

A. Well, one has to take the specified training, which at that time was a year and a half rotating internship and at least two years

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of specialty training in an accredited Department of Pediatrics. And when I was accredited, that accreditation is provided by the American Board of Pediatrics as one of the many specialty boards in medicine.

And after two years of practice, then one was eligible for examination by the board. And that is a board that's nationally constituted in contrast to the state boards of registration, which provide for certification for the practice of medicine.

Q. I think most people obviously know, generally speaking, what a pediatrician is, but what is the technical definition of the specialty of pediatrics?

A. Well, pediatrics is a specialty that deals with both trying to keep children well as well as trying to diagnose and treat the disorders of children. It places a great deal of emphasis on health promotion and disease prevention.

Q. Does a pediatrician deal with basically all the diseases and problems that can happen to children across a wide spectrum?

A. Yes, that is correct.

Q. Now, let me discuss with you in part your

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teaching career.

What did you do at the University of Illinois School of Medicine?

And during what time frame?

A. Well, I joined the faculty following my residency, faculty of the University of Illinois, Department of Pediatrics. And I stayed there from 1948 to 1953 and rose to be a full professor of pediatrics having started out as an assistant professor.

Q. And from the University of Illinois, when you left there, where did you go, to what other medical school?

A. To the State University of New York School of Medicine at the Upstate Medical Center in Syracuse, New York.

Q. And what positions did you occupy there?

A. I went there as professor and chairman of the Department of Pediatrics at that medical school. For the last five years I also was dean of the school.

Q. You were actually the dean of the medical school at Upstate Medical Center in Syracuse, the State University of New York for how many years?

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A. Five years.

Q. And then when did you begin your association with the Harvard Medical School?

A. I moved to the Harvard Medical School in 1971. I should say that it was in the interval from '65 to '67 that I served in Washington in the position as director of Head Start on leave from my position at the State University of New York in Syracuse.

Q. Can everyone hear the doctor?

Okay. Fine.

Now, in going down your curriculum vitae, Dr. Richmond, it indicates you were professor and chairman, Department of Preventive and Social Medicine at the Harvard Medical School. Please explain to the jury, at least in general terms, what the Department of Preventive and Social Medicine was all about, its purpose, its function.

A. Well, the Department of Preventive and Social Medicine, which I was asked to chair shortly after I came to Harvard, is a department that focused heavily on the prevention of disease, the promotion of health; and also on social factors that relate to health. To

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observe what kinds of impacts, for example, living in poverty, had on health, what kinds of impacts housing conditions, poor sanitary conditions, all of the social issues that we've come to know of as public health.

And that department was concerned in the medical school with trying to help students understand the importance of protecting the public's health.

Q. At Harvard, what is the relationship between the School of Public Health and the Harvard Medical School itself?

A. Well, one could say they're separate but equal. Each of the schools is autonomous, but there is obviously a great deal of interaction among faculty members. And a number of faculty members, and I was one of them, would hold positions, faculty appointments in both schools.

Q. So if you would, then, please summarize for us the other positions you held, basically your career at Harvard.

A. I came initially to Harvard as professor of child psychiatry in human development. And that carried with it the clinical appointment at the Boston Children's Hospital to chair the

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Department of Psychiatry at that children's hospital.

And simultaneously, I was the director of the Judge Baker Children's Center, which is a pioneering child guidance clinic for children dealing with children with psychological and social problems.

Q. Are you at the present time retired?

A. Well, no. I became emeritus because of university statutes that require one to become emeritus.

Q. Explain what that means, the going to emeritus status.

A. Well, the university relieves one, it can't now because of some of the new legislation, but at age 70 it was required, not that one stop working, but that one become emeritus. The designation of emeritus from the university's vantage point essentially meant that they no longer provided a salary.

So I've said to my colleagues, I became emeritus, but I didn't retire because I retained my offices and carried on my usual activities.

I would say that with the title of emeritus one is not required to perform any specific

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functions, but I have continued to perform them.

Q. And you went to emeritus status in what year?

A. In 1988.

Q. Obviously in your curriculum vitae you talk about hospital appointments and various professional positions and honorary degrees. There's also a section about honors and awards. Let me just ask you specifically about a few of them.

The Sedgewick Medal of the American Public Health Association you received, tell us what that is.

A. Well, the American Public Health Association is the association of professionals in the field of public health. And they regard the highest award that they make in that association as the Sedgewick Medal for the person that they believe has made the greatest contributions to the field of public health.

Q. And what is the, if I'm pronouncing this right, the Gustav Lenhart Award?

A. The Lenhart is an award of the Institute of Medicine of the National Academy of Sciences. And I received the first of those awards, which

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is recognition for having done the most, as the committee determines it, for the promotion of personal health services in the United States.

Q. This next one will sound familiar to a lot of people. The Ronald McDonald Award, which I assume is awarded by McDonald's?

A. Well, it's their charitable arm. The Ronald McDonald Children's Charities established an award to recognize people who have made significant contributions for the health of children. And I received the first of those awards.

Q. And the John Holland Award?

A. The John Holland Award is awarded by the American Pediatric Society. That's the senior society of pediatric researchers in this country. And that's the highest award that it makes. And that's largely for what I did in pediatric research.

Q. Now, doctor, there is in your curriculum vitae a very lengthy list of your publications. And obviously I'm not going to go -- there are over 200 of them -- I'm not going to go through each and every one, other than to ask you in a general way to please tell the jury the names of

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some of the medical journals in which your articles have appeared.

A. Well, my articles have appeared in journals like Pediatrics, which is the official publication of the American Academy of Pediatrics. In Pediatrics, in Clinical Cardiology, or Cardiology Clinics and in the American Journal of Public Health, and many other professional journals.

Q. Now, the field of public health, what exactly is that?

A. Well, the field of public health is a field which is designed to, first, understand the causation of disease, and secondly, to try to arrive at methodologies for the prevention of such disease. And then as a consequence of what we learn from those kind of studies, to try to provide health promotional advice to the public, that is, how they can maintain and improve their health.

So it's the study of populations and disease patterns in populations in order to better understand and to provide better programs for preventive disease and promoting health.

So it's the field which is dedicated really

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to protecting the health of the public.

Q. Does the field of public health include the prevention of such diseases as lung cancer, other cancers and heart disease?

A. Yes. Very much so.

Q. In general terms, what does that very thick book, the 1979 Surgeon General's Report, represent; what does it encompass?

A. Well, this is the report that was published as my first Surgeon General's Report.

And what it did was review all of the data that had been published since the first Surgeon General's Report. So over the 15 years, there were over 3,000 publications that were reviewed in this document.

And what we concluded during the course of this review was that the data were overwhelming in terms of the impact of smoking on health. That the first Surgeon General's Report had not only been correct, but also that all of the additional data went in the same direction of reinforcing the findings of that first Surgeon General's Report.

Q. And specifically the finding relating to the issue of causation, does cigarette smoking

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cause lung cancer and other diseases, what was the conclusion reached in the 1979 Surgeon General's Report?

A. The conclusion was that there was a causal link that cigarette smoking did indeed cause cancer.

Q. Dr. Richmond, in 1979 was there a debate in the medical and scientific communities of the United States of America as to the conclusion reached both in 1964 and 1979 that cigarette smoking does in fact cause lung cancer and other diseases?

A. In the scientific community -- and that's what you asked me --

Q. Correct.

A. -- there was no debate.

And if I may quote myself, which I'm a little reluctant to do because I'm ordinarily a modest man --

Q. Please do so. You're now reading --

A. -- as I wrote in that report 15 years later, this is after the first Surgeon General's Report, the scientific evidence on the health hazards of cigarette smoking is overwhelming.

Q. Now, I'm going to return this book to you.

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Before the Surgeon General's Report of 1979 was published, had you read every page in that Surgeon General's Report?

A. Yes, I personally read every single word of it.

Q. Other than --

A. Took a long time to read it, too, I might say.

Q. And when did you read it?

A. Over my Christmas holiday, because I knew it was to be published. We had to have it published before for that January 11th date.

Q. That was the target date?

A. Yes.

Q. January 11, '79?

A. '79.

Q. Other than the preface that you wrote, did you write, personally, any other chapters?

A. No, I did not personally write any other chapters. But I read all of the reviews that various experts around the country were generous enough to provide us with.

Q. That was my next area of questioning. How were the doctors who did write individual chapters selected to write those individual

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chapters? And secondly, before it was decided that a given chapter would be included, what process did it have to go through?

A. Well, initially in developing the report we would identify for each section of the report the most authoritative person in the nation. And that person would provide us with his best review and recommendations, his or her best review and recommendations.

And we then would select reviewers who were unaffiliated in any professional way with the primary authors and ask those reviewers to give us their best advice.

So when I said that I read the total document, I also read the reviewer's comments and then I sometimes, with my staff, would need to rewrite or redevelop those chapters.

Q. Explain to the jury, if you would, what is meant by the term, and the concept of peer review.

A. Peer review is the process that I suggested when one develops a panel of experts who are the best qualified professionally in that field to provide their best critique or criticism of that document. This is a

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time-honored process in professional publications. That is, in the respective professional publications. That is the way judgments are made about the publication of articles.

So in addition, in this document to all of the peer review, I essentially, then, peer-reviewed all of those documents. And what is in this document carried my imprimatur as the final reviewer.

Q. During opening statement I told the jury that one of our witnesses would be Dr. David Burns. What role did Dr. David Burns play in the 1979 Surgeon General's Report?

A. Well, because of the complexity of developing a document like this, I wanted to identify the best professional person that I could to help us do the planning and the assignment of authors. And Dr. David Burns was generous enough to drop what he was doing at that time at the University of California and come to Washington and help us in the development of this document.

Q. Now, I notice in terms of the table of contents it has many, many chapters. And the

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authors of chapters are of course identified. Look at chapters 11 and 13 and tell us the title of those chapters and the name of the author.

I think at the table of contents at the beginning, doctor.

A. I'm close to having it.

Q. Okay.

A. Chapter 10 you asked for first?

Q. Chapter 11.

A. Chapter 11, I'm sorry.

That's the chapter on involuntary smoking.

Q. And who's the author of that?

A. I have to go to the first to get that.

Q. Dr. Burns. And also --

A. Dr. Burns.

Q. -- Dr. Burns was the author of chapter 13. Okay, the document will reflect what it will reflect.

What was the tobacco industry's response to the 1979 Surgeon General's Report? And what I mean by that question is: In terms of their public response?

A. Well, to me it was one of the most amazing things I had ever encountered in my professional career, because the day before we were to issue

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the report, and the report was not available anywhere publicly, they called a press conference to refute the report when nobody publicly knew what was in the report.

So there was a refutation on the day before called by the Tobacco Institute of this report. And what they were trying to say is that it's old stuff and it isn't true.

Q. That was their bottom line, that the 1979 Surgeon General's Report, which reaffirmed the conclusion that cigarette smoking causes lung cancer and other diseases wasn't true?

VOICE: Objection, leading, asked and answered.

THE COURT: Sustained. Let the witness answer.

VOICE: Okay, I want to put in evidence --

A. Well, I must say I was deeply offended on an ethical basis, the day before this report was to be released that they call a conference.

VOICE: Objection, Your Honor.

THE COURT: I'll sustain the objection because that wasn't part of the question asked.

Q. It reminds me of a question I was thinking about.

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Why were you deeply offended?

A. Well, I was deeply offended because I felt it was a very unethical process.

Q. In other words, no one had seen the 1979 Surgeon General's Report? Had anyone seen the 1979 Surgeon General's Report? I mean any member of the general public seen it before the tobacco industry called their press conference?

A. No, it was not available.

Q. Have you seen this document?

A. I recall having seen that some time ago. I haven't read it recently.

Q. Okay. So the specific statement I'm asking you about, Dr. Richmond, is this statement: We always have and always will cooperate closely with those whose task it is to safeguard the public health.

As Surgeon General of the United States, was it your task to safeguard the public health?

A. Yes, that was my responsibility.

Q. Did the tobacco companies cooperate closely with you in that task?

A. No, I could not get them to reveal any of their research to us.

And on one occasion I specifically asked

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them to tell us what additives they were using in cigarettes at that time, because as they were trying to reduce tar and nicotine, we knew they were trying to manipulate the additives in cigarettes to make them more palatable. And in a direct conference with the attorneys representing the tobacco industry, Covington and Burling -- they, and I specifically asked them and they would not give me any indication of what specific compounds they were adding to cigarettes to make them more palatable.

As just one example of their lack of cooperation.

Q. As Surgeon General of the United States between 1977 and 1981, did you have occasion to engage in public debates on television or in any other forum with representatives of the tobacco industry?

A. Yes. On the MacNeil-Lehrer Show, I was on with Walter Merryman, who represented the Tobacco Institute. And we kind of had a running dialogue in the media with the reports that I would render, the statements that I would make with the tobacco industry countering them.

Sometimes these were direct confrontations

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and other times they were debates in the media.

Q. In a general way in terms of your one-on-one debates with a representative from the Tobacco Institute, what position did they take with respect to the issue of whether cigarette smoking caused disease?

A. Well, their general position was, first, to deny that cigarette smoking had anything to do with ill effects on health. And then secondly, to create a lot of confusion about what the data reflected.

Q. During your tenure as Surgeon General, after your Surgeon General's Report of 1979, was there a Surgeon General's Report in 1980?

A. Yes, there was.

Q. Was there a Surgeon General's Report in 1981?

A. Yes, there was.

Q. And did you supervise '80 and '81 pretty much in the same fashion as you did the '79 report?

A. That's correct.

Q. Did there ever come a time during your tenure as Surgeon General where a representative of the tobacco industry said, we agree with the

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conclusions of the Surgeon General, or we agree with any overall conclusion of the Surgeon General relating to issues of smoking and health?

VOICE: Objection, leading?

THE COURT: It's not leading, overruled.

A. I was never aware of their being supportive of any of the positions that I took. But I was acutely aware, as I indicated earlier, of the fact that they were attempting to create confusion about whether there was any relationship to the use of tobacco products and disease.

Q. So Dr. Richmond, I'm going to now hand you the Surgeon General's Report of 1986, the title of which is The Health Consequences of Involuntary Smoking, a report of the Surgeon General. And I may ask you some specific questions.

Had you read this Surgeon General's Report, the 1986 Surgeon General's Report?

A. Yes, I have.

Q. Did you, after having read it, did you agree with its conclusions?

A. Yes, I did.

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Q. Now, please go to the foreword by the Assistant Secretary for Health, Dr. Wyndham, Roman Numeral VII in the bottom right-hand corner.

It's about the fourth page and the title is foreword, at the top.

A. Yes, I have it.

Q. Now, go to the third paragraph on that foreword page and follow along with me.

Quote, the current report, The Health Consequences of Involuntary Smoking, examines the evidence that even the lower exposure to smoke received by the nonsmoker carries with it a health risk. Use of the term involuntary smoking denotes that for many nonsmokers exposure to ETS is the result of an unavoidable consequence of being in proximity to smokers. It is the first report in the Health Consequences of Smoking series to establish a health risk due to tobacco smoke exposure for individuals other than the smoker and represents the work of more than 60 distinguished physicians and scientists both in this country and abroad.

After careful examination of the available

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evidence, the following overall conclusions can be reached: Number one, involuntary smoking is a cause of disease including lung cancer in healthy nonsmokers.

Two, the children of parents who smoke compared with the children of nonsmoking parents have an increased frequency of respiratory infections, increased respiratory symptoms and slightly smaller rates of increase in lung function as the lung matures.

Number three, simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate exposure of nonsmokers to environmental tobacco smoke. End quote.

Do you agree with everything I just read or do you take issue with anything I just read?

A. No, I think I would agree with those conclusions.

Q. You're with me, doctor, on that page?

A. Yes, yes, indeed.

Q. Okay.

Quote: As a nation we have made substantial progress in addressing the enormous toll inflicted by active smoking. Efforts to

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improve and protect individual health must be not only continued, but strengthened. On the basis of the evidence presented in this report, it is clear that actions to protect nonsmokers from ETS exposure not only are warranted, but are essential to protect the public health. End quote.

As a specialist in the field of public health and preventive medicine, do you agree or disagree with that statement?

A. Oh, I agree with that statement very much.

Q. Now, your deposition, you gave a deposition in this case where you were questioned by lawyers. And I was present at that deposition where you gave testimony. Other than this case, have you ever testified in court before in a litigated matter against the tobacco industry?

A. No, I have not.

Q. Dr. Richmond, in terms of the scientific and medical communities across the United States, after the 1986 Surgeon General's Report came out on the subject of involuntary smoking, on the subject of secondhand smoke, was there any longer a debate in either the scientific or

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medical communities on the issue of whether secondhand smoke caused disease?

VOICE: Objection, leading argumentative.

THE COURT: It's not leading and it's not argumentative. Overruled.

A. Yes, I think it's appropriate to state that really there wasn't in the scientific community any real debate about the data.

I should add that there was another very significant report in 1986 issued by the National Research Council of the National Academy of Sciences. And since I'm a member of the Institute of Medicine of that academy, I'm familiar with the process by which they go through their studies. And they came to essentially the same conclusions.

And so, I feel that after 1986 with the publication of those reports, which represented the consensus in the scientific community, that it was really established scientifically that there was a relationship between environmental tobacco smoke and the development of cancer and other disorders.

Q. Now, Dr. Richmond, the National Academy of Sciences is exactly what; what kind of

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organization is that?

A. That is an organization which represents people who have attained high scientific achievement. It's an organization to which one doesn't apply for membership. One has to be elected to membership by one's scientific peers.

Q. And is it, in fact, a national organization?

A. It represents the nation. It's chartered by Congress to act in the public interest in areas of science.

Q. In terms of the publications of the National Academy of Sciences, is there a peer review process?

A. Yes, it's a very rigorous peer review process.

Q. And how does that work?

A. Essentially, as I described before, scientists from around the country are nominated by committees of the National Academy of Sciences to first, as a committee, design a process of study to do the study to then publish its results after having had that study peer-reviewed by scientists drawn from around the country.

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Q. Dr. Richmond, when you were Surgeon General of the United States, were you in favor of banning smoking on airplanes?

A. Yes, I was.

Q. Why?

A. Well, the evidence was beginning to accumulate scientifically that environmental tobacco smoke was harmful to health. And as I travelled around the country on airplanes, I experienced the kinds of irritation, both the eyes and the nasal passages and the respiratory tract, that people flying on airplanes in those days experienced.

Q. In other words, it's all right for you to discuss your experience on the airplanes, but don't tell us what flight attendants said to you. That was the basis --

THE COURT: He's just trying to explain the ruling of the court that it would be hearsay and not to mention it.

A. But as the information was developing, I felt it was a prudent recommendation to make.

Q. When you were Surgeon General of the United States, did you have occasion to fly a lot?

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A. Yes, I did.

Q. What did you notice as a passenger in airplanes about the effect of secondhand smoke within the physical cabin itself?

A. Well, that the smoke was very pervasive, very irritating. And of course the longer the flight, the more irritating it became.

I think I should add, it also smelled bad in addition to visual and respiratory symptoms, it was also the odor.

Q. Now, Dr. Richmond, go, if you would, back to the 1986 Surgeon General's Report. And go to -- at the beginning, Roman numeral 11. And the heading is: Public Health Policy and Involuntary Smoking.

A. Yes.

Q. And by the way, what I'm reading now is a preface from the then Surgeon General of the United States, G. Everett Koop; is that correct?

A. That's correct.

Q. So you're on page 11, Roman numeral?

A. That's correct.

Q. The bottom of the page where Dr. Koop says as follows: The 1986 Surgeon General's Report on The Health Consequences of Involuntary

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Smoking clearly documents that nonsmokers are placed at increased risk for developing disease as the result of exposure to environmental tobacco smoke. Critics often express that more research is required, that certain studies are flawed or that we should delay action until more conclusive proof is produced. As both a physician and a public health official, it is my judgment that the time for the delay is passed. Measures to protect the public health are required now. The scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.

Do you agree with Dr. Koop?

A. Yes, I do.

Q. By the way, what area of medicine was Dr. Koop a specialist in; do you know?

A. Pediatric surgery.

Q. He was a surgeon. Although you were board-certified in pediatrics, you were not a surgeon, but generally the same field, correct?

A. Correct.

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Q. Now, Dr. Richmond, in terms of the time that you have put in on this case in terms of reviewing materials, going back and looking at the -- your own Surgeon General's Reports, other Surgeon General's Reports, reviewing the Environmental Protection Agency report, giving a deposition, coming from Boston yesterday to Miami, giving testimony today, what are you charging?

A. I'm not charging any fee.

Q. Before today, July 1997, have you ever given testimony before in a courtroom?

A. No, the only cases I've testified in in the past relate to child adoption cases.

Q. Dr. Richmond, based upon your education, training and experience, including your career of patient care, teaching, your career in public health and disease prevention, your service as United States Surgeon General, do you have an opinion based upon reasonable medical probability as to whether breathing secondhand tobacco smoke in airline cabins causes disease in nonsmoking flight attendants?

VOICE: Objection, Your Honor.

A. Yes, yes, I do.

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THE COURT: Overruled.

VOICE: As to qualifications, Your Honor?

VOICE: Objection.

THE COURT: Overruled.

Q. What is that opinion?

A. That opinion is that on the basis of scientific evidence and what we know of the composition of tobacco smoke and the carcinogenesis or cancer-causing properties of some of those chemicals, that breathing secondhand smoke in enclosed places and particularly as enclosed as airplane cabins have been, that the risk would be very considerable to health.

Q. I'm asking you not about the risk, but about whether it causes -- do you have an opinion as to whether breathing secondhand smoke in nonsmokers causes disease in nonsmokers?

A. Yes, that it does cause disease.

Q. And Dr. Richmond, based upon your education, training and experience, do you have an opinion, Dr. Richmond, based upon reasonable medical probability as to which diseases are caused from breathing secondhand tobacco smoke?

VOICE: Your Honor, I assume we have a

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standing objection based upon my earlier objection --

THE COURT: Yes, sir.

Q. You can answer it. Let me repeat the question.

THE COURT: You don't have to repeat it, I think he understands it.

Q. You can answer the question.

A. I think I do need a repeat.

THE COURT: I know sometimes the objections throw you off track a little.

Q. Do you have an opinion based upon reasonable medical probability as to which diseases are caused from breathing in secondhand smoke?

A. Well, the diseases that relate to the respiratory tract. And certainly as a pediatrician I would comment on the diseases of childhood that are accentuated by environmental tobacco smoke.

VOICE: Objection.

THE COURT: Overrule the objection as far as it goes.

A. Irritations of the respiratory tract, the precipitation of asthma and asthma attacks in

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children; and then in adults the exposure produces chronic respiratory diseases, such as emphysema and lung cancer and cancer of the paranasal sinuses. Certainly cardiac disease.

CROSS EXAMINATION

Q. Good afternoon, Dr. Richmond. I introduced myself at the break, but my name is Walt Cofer. I represent Philip Morris and Lorillard. I have some questions for you, too.

A. Yes.

Q. I'm going to ask you if you would please try to speak into the microphone or keep your voice up, because it's hard for everyone to hear.

Doctor, you were Surgeon General of the United States Public Health Service from 1977 to 1981, correct?

A. That's correct.

Q. Your specialty is in childhood development, pediatrics and child psychiatry; is that right?

A. Yes.

Q. And you're board-certified in pediatrics?

A. That's correct.

Q. Now, you told the jury on direct

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examination what it means to be board-certified, the rigorous examination, the two years of training, and that's all something you went through for pediatrics, correct?

A. That's correct.

Q. Now, you are not board-certified in any other medical specialty, are you?

A. No, I'm not.

Q. For example, you are not board-certified in oncology, which is the study of cancer?

A. That's correct.

Q. You're not board-certified in pulmonology, which of course specializes in lung and lung diseases?

A. That's correct.

Q. And you're not board-certified in cardiology, which deals of course with the heart and vascular system, correct, sir?

A. That's correct.

Q. And you haven't taught any courses in cardiovascular disease or lung cancer, have you?

A. Well, when I was teaching pediatrics, I taught about pulmonary diseases and cardiac diseases.

Q. I think -- and probably not much of a

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distinction -- I think you told us in your deposition that you never taught a course on cardiovascular disease; is that correct?

A. In a formal sense, yes.

Q. And, sir, you have no formal training in epidemiology?

A. Well, yes, I trained in medical school in epidemiology. And during the course of my career in preventive and social medicine --

Q. I understand --

A. -- I participated in the teaching of epidemiology.

Q. I apologize for interrupting.

Certainly I understand that you're familiar with it in your capacity as Surgeon General, but specifically you can't tell us, for example, what the recognized confidence interval is for epidemiological studies?

A. I know in general what that is, yes.

Q. Did you learn that after we took your deposition in March, sir?

A. No, I think I generally know what confidence intervals are.

Q. Do you recall that your deposition was taken in this case in March of this year; do you

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recall that, sir?

A. Yes.

Q. And you were under --

THE COURT: Counsel, if you're going to go into a deposition, let me explain what a deposition is to the panel.

For those of you who don't know, during the beginning of the case, before trial, both sides are entitled to take the statements of a potential witness. We call those statements depositions. They're usually given notice in advance that the deposition will be taken. And the deposition can be had at many locations, either one or the other attorney's offices or the home or office of the person to be deposed or anyplace convenient and mutually agreed upon.

Present at the deposition is a court reporter, much like this young lady, although not necessarily her, and both sides are present and both raise questions and objections at the deposition, just as they would had the witness been here live in court to testify.

Under certain circumstances those depositions may be read in court in lieu of live testimony or during the process of live

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testimony may be referred to by one or the other parties for purposes of examination. So that's what we mean when we start talking about depositions.

Yes, sir.

VOICE: I'd like to hand him his deposition.

THE COURT: Also must add one thing. I did forget that at the deposition the witness is sworn just as they are here in court.

All right, we have a clip, that's okay.

Q. Now we all have copies.

Doctor, I don't mean to quibble with you at all, but I just want to make sure I have an understanding of your familiarity with epidemiology, epidemiological concepts.

And counsel, I'm reading from page 101, lines 4 through 6.

It's true, sir, that you were asked this question: And do you know what the recognized confidence interval is for epidemiological studies? And you gave this answer: No, I wouldn't be able to quote that.

A. Well, I meant in a technical sense I wouldn't be able to define it. But in terms of

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utilization of confidence intervals.

Q. Fair enough. Thank you.

Now, it is true that you would not feel competent or qualified to tell us what the significance would be of a relative risk of say 1.1 or 1.2 or even 2 or 3 or 4; isn't that correct?

A. No, I know how to apply those, yes.

Q. Well, again, turning to page 102 of your deposition, and this is starting at line 22, you were asked this question: Doctor -- and gave the following answer: Question, you would not feel competent or qualified to tell us what the significance would be of a relative risk of say 1.1 or 1.2 or even 2 or 3 or 4? Answer, that's correct.

That was your testimony, correct, sir?

VOICE: What line are you on?

Q. I started on line 23 at the bottom of page 102 and it ends at the top of page 103, line 1.

My point is that clearly you're familiar with epidemiology as Surgeon General, but some of the concepts you haven't had training in and you're not familiar with, correct?

A. Yes, I was saying that technically I don't

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derive those numbers myself, yes.

Q. Okay. Let's talk about your research then, the things that you've done, your hands-on research throughout your career.

You've emphasized medical issues relating to children, haven't you, doctor?

A. That's correct.

Q. In fact, other than the '79 Surgeon General Report, which of course was put out when you were the Surgeon General, you have not published on the subject of secondhand smoke at all, have you, sir?

A. No, I have not.

Q. And you haven't conducted any research on cabin air quality or its affect on flight attendants, have you?

A. No, I haven't conducted any research, but I have a lot of personal experience.

Q. And we'll have a chance to talk about those in a few minutes. I appreciate that.

And you've not personally examined any of the plaintiffs in this case or reviewed their medical records, have you, doctor?

A. That's correct.

Q. I think you told us you're currently an

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emeritus professor at the Harvard Medical School?

A. That's correct.

Q. Now you treated patients up until 1988; is that correct?

A. No, even later than that.

Q. How long did you treat patients?

A. What's that?

Q. And how late did you treat patients? I had '88 in the deposition.

A. Well, I consult clinically even to this day.

Q. Okay, thank you. You haven't taught on a regular basis since '89; is that correct?

A. That's correct.

Q. Now, when you were Surgeon General, you issued two reports on smoking and health, correct?

A. Well, three really.

Q. Well, you started the last one, but by the time it was actually issued you were no longer Surgeon General?

A. That's correct.

Q. Is that accurate, sir?

A. That's correct.

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Q. And the two that you signed when you were Surgeon General were the 1979 report and the 1980 report?

A. That's correct.

Q. Now, the 1980 report had nothing to do with secondhand smoke, did it?

A. No.

Q. It was entitled, The Changing Cigarette?

A. That's correct.

Q. Now, the 1979 report, the one that Mr. Rosenblatt asked you about, it did, among other things, address secondhand smoke, didn't it, sir?

A. Yes, it did.

Q. Now, I think this was brought out on direct, but just so it's clear in everyone's minds, you didn't actually write that report, you wrote the preface only, correct?

A. That's correct.

Q. And the report was written by a number of authors?

A. That's correct.

Q. Who were experts in their fields?

A. That's correct.

Q. But you personally reviewed every single

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word in the reports?

A. That's correct.

Q. Because you wanted to make sure that before you put your stamp of approval on it you agreed with everything in it, right?

A. That's correct.

Q. And in addition, the Surgeon General Report, it cites a bunch of other research reports, that's the basis to collect it and analyze it?

A. That's correct.

Q. And the primary research reports that were cited in your '79 Surgeon General's Report were quality research that you were satisfied with, right?

A. That's correct.

Q. Now, I think you mentioned, maybe not in these words, but the '79 Surgeon General's Report is kind of special because it was the 15th anniversary after the initial '64 report, right?

A. That's correct.

Q. And one of the purposes of the '79 report was to collect in one place everything that had happened in smoking and health since 1964,

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right?

A. That's correct.

Q. Now, I just want to talk to you for a moment about the '79 report and its section on secondhand smoke, okay?

Now, in that report you distinguish between so-called acute effects, complaints of annoyance and discomforts and possible health effects, didn't you, doctor?

A. Yes.

Q. And with respect to acute effects, the report found -- and I'll hand you a copy if you want, but see if you recall it, this is Chapter 11, page 28.

Quote: In summary, a substantial proportion of the normal population experiences irritation and annoyance on being exposed to cigarette smoking. The eyes and nose are the areas most sensitive to irritation and the level of irritation increases with increasing levels of smoke contamination.

Correct, sir?

A. That's correct.

Q. That was one of your conclusions.

But the report also found, quote, healthy

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nonsmokers exposed to cigarette smoke have little or no physiologic response to the smoke and what response does occur may be due to psychological factors.

Correct?

A. That's correct.

Q. So in essence what that means is it was a conclusion of your '79 report that healthy smokers do not experience health effects from breathing other people's smoke?

A. No, that's not precisely what I said. Because if you read in another area, it said there is sufficient suggestion concerning adverse health effects so that much further study is warranted.

Q. Thank you. That's exactly the point I want to get to. And I appreciate you bringing that to the jury's attention.

You did personally write the preface, correct?

A. That's correct.

Q. And on page 7, which is the first page of the preface, you wrote, quote, this 1979 report describes our current knowledge of the health consequences of smoking, the behavioral aspects

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of smoking and efforts in education and prevention. It presents strong conclusions where they are warranted by the accumulation of evidence. It provides alternative working hypotheses when the available facts are not sufficient to warrant conclusions, it suggests future lines of inquiry where there are gaps of existing knowledge.

Correct, sir?

A. That's correct.

Q. And your report does conclude with respect to environmental tobacco smoke, quote -- this is on page 35, counsel, Chapter 11, page 35 -- attention to involuntary smoking is of recent vintage and only limited information regarding the health effects, such as exposure upon the nonsmoker is available; therefore, research is needed to define these effects.

And that was your conclusion, correct, sir?

A. Yes, and that follows the same pattern of our accumulated knowledge about smoking in general. We didn't start out with all of the knowledge that we wanted, but it gradually accumulated so that by 1964 we could make definitive statements. But the then Surgeon

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General could make definitive statements.

So at that snapshot in time that was as much as we could say.

Q. And I appreciate that. And I promise you I'm going to give you an opportunity to talk about your current views.

But the point is, in 1979 with all of the evidence considered, as you suggested, by the finest experts, peer-reviewed, your conclusion was more research is needed, right?

A. That's correct.

Q. Now, isn't it true that when you were Surgeon General you did not have any hard and fast evidence that you thought established a link between secondhand smoke and the health of nonsmokers?

A. Well, I was not certain, but I certainly considered that as a likely possibility. And as a consequence recommended further research.

Q. Exactly. Thank you.

Now, let's talk about airlines for a second, because Mr. Rosenblatt brought out on direct examination that while you were Surgeon General it was your position that cigarette smoking should be prohibited on airplanes,

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correct?

A. That's correct.

Q. And basically, that was because you didn't think nonsmokers wanted to sit next to smokers, right?

A. That was one reason.

Q. And you figure that if smoking was harmful to smokers, then secondhand smoke was probably not good for nonsmokers, right?

A. That's correct.

Q. Now, that position was not based on the results of any study on smoking on airplanes, was it?

A. No, not at that time.

Q. And in fact, there were studies back then, weren't there, of smoking on aircraft?

In your '79 report you cited a study, a joint study, called Health Aspects of Smoking in Transport Aircraft that was jointly funded by the Federal Aviation Administration, the Department of Transportation and the National Institute for Occupational Safety and Health, which is the U.S. Department of Health Service and Welfare Public Health Service. That's your agency, right?

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A. That's correct.

Q. And on pages --

THE COURT: Has that document been marked for identification purposes?

Q. Your Honor, it has. This is marked Defendants' Exhibit D010B.

THE COURT: We're using numbers that had been previously put on there for purposes of ease of accounting. But was this previously marked for ID purposes?

THE CLERK: Defendants' 1089.

THE COURT: For identification.

THE CLERK: For ID.

Q. Let me hand you a copy.

THE COURT: Is that in the report itself?

Q. Your Honor, the study is referred to in the report. It's one of the reports that Dr. Richmond presided over.

THE COURT: All right.

Q. Then again on page 1126 it says: Several federal agencies cooperated surveyed the symptoms experienced by travellers on both military and commercial aircraft.

Just so it's clear, the bibliography, which is footnote 60, doctor, National Institute for

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Occupational Safety and Health Department of Transportation, Federal Aviation Administration, Health Aspects of Smoking and Transport Aircraft, U.S. Department of Health, Education and Welfare, Public Health Service, so on, et cetera.

Correct, doctor?

A. Yes.

Q. So of course you were familiar with that report when the '79 Surgeon General's Report was published, correct?

A. Yes.

Q. And of course one purpose of the report, or the study, of this study, Health Aspects of Smoking in Transport Aircraft was to, quote, define the levels of certain combustion by-products of tobacco produced by smokers.

Correct, doctor?

A. That's correct.

Q. I'm reading from the first page of the abstract. I'll let you just hang on to that.

So that was one purpose of the study, to quote, define -- it's the first highlighted portion -- define the levels of certain combustion by-products of tobacco produced by

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passengers smoking.

Correct, doctor?

A. Yes.

Q. The researchers measured environmental exposure levels of carbon monoxide, particulate matter, polynuclear hydrocarbons, ammonia and ozone on over 28 flights.

Correct?

A. Yes.

Q. And they found, quote, results -- and this will go over to the next page -- results of environmental sampling revealed very low levels of each contaminant measured much lower than those recommended in occupational and environmental air quality standards.

And finally, the 1971 joint report of the FAA and the Public Health Service concluded, quote, these combustion products were judged not to represent a hazard to nonsmoking passengers based on environmental levels and expected dosage response relationships of contaminants.

Did I read that correctly, sir?

A. Yes, you did.

Q. And that study is quoted in your '79 Surgeon General's Report, correct?

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A. Yes.

Q. Well, I told you I would, so to be fair, let's talk about your current views.

A. Well, if I might make a comment.

Q. Sure.

A. That study and the quote that you made indicates that there are compounds which are considered to be carcinogens that were measured, they just thought they weren't high enough then. But my suspicion was that in the enclosed cabins and over extended periods of time, since there is no threshold level, that the cumulative effect would be significant enough to create hazards. And that's why I recommended more research.

Q. I'll tell you, I appreciate that and the jury appreciates that as well, and we'll discuss that in more detail. But my question is this: When you made the recommendation that smoking not be permitted on planes, you did have a study that you cited in your '79 Surgeon General's Report?

A. That's correct.

Q. And that was a study funded by the FAA and your Public Health Service, correct?

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A. That's correct.

Q. And what that study concluded was, quote, these combustion products were judged not to represent a hazard to the nonsmoker passengers based on environmental levels and expected dosage-response relationships of contaminants.

Correct?

A. Correct. But it should have also specified on the basis of our knowledge at that time.

Q. Now, you would agree, wouldn't you, that a flight attendant's exposure to secondhand smoke in airplanes depends on a number of variables?

A. That's correct.

Q. It would depend on how many flights you worked where smoking was permitted, right?

A. That's correct.

Q. How many people were smoking on the flight, correct?

A. That's correct.

Q. How many cigarettes they smoked?

A. That's correct.

Q. Her proximity to the smoker, right?

A. Well, in airline cabins the smoke was never well contained, so generally it diffused

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throughout the cabin.

Q. Were you aware, doctor, that up to 1980 that in aircraft cabins there was no recirculation of air whatsoever; did you understand that the air that came in was 100 percent fresh air? Were you aware of that?

A. Yes, I was.

Q. And of course ventilation has a profound effect, doesn't it, on environmental tobacco smoke?

A. But the shift was to smoke exchange that was only 50 percent in cabins.

Q. I'm sorry, I thought you said they were never exposed. Let's talk about, let's go through these other factors, we'll talk about ventilation. Would it matter to you in determining a flight attendant's exposure, your judgment whether she worked in a smoking or nonsmoking section?

A. Not completely, no. Because again the data are that the smoke would get into the nonsmoking sections.

Q. Now, you distinguish between planes that had 100 percent fresh air and those that had refreshed air?

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A. Correct.

Q. So with respect to any flight attendant in determining his or her exposure you would want to know whether she or he flew on planes that had 100 percent circulation or recirculated ventilation?

A. That's correct.

Q. And if they flew on planes that had recirculated ventilation you would need to know about that system, wouldn't you?

A. Yes.

Q. I mean, because you know for example that some systems take the air out of a specific zone, run it through high efficient particulate air accumulators and return it to that zone, were you aware of that?

A. That's correct.

Q. Whereas there are some planes that take it, mix it, filter it and disburse it throughout the plane and you would want to know the difference, wouldn't you?

A. Yes.

Q. Now, you recognize in the Surgeon General's Report the profound effects of ventilation on environmental tobacco smoke,

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didn't you, in terms of dissipating it?

A. I don't quite comprehend --

Q. Did you use the words measuring carbon monoxide or were there reports on carbon monoxide noting how quickly the carbon monoxide level disappeared with even modest amounts of ventilation?

A. Yes, that's reasonable.

Q. So you recognized ventilation is a crucial factor in determining exposure to any airborne contaminants, right?

A. That's correct.

Q. Some of the ventilation people say dilution is the solution to pollution, and that's really what that means, right?

A. That's correct.

Q. You mentioned in response to one of my earlier questions threshold. So I want to ask you a few questions about that. Essentially that goes to the old saying dose makes the poison, correct? And generally speaking it is true that the amount of exposure to something is crucial in determining whether it causes anything, right?

A. That's correct.

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Q. Because there are some exposures that are just so minimal you would not expect them to cause disease?

A. That would be one possible conclusion.

Q. Well, let me give you some examples, for example, if a flight attendant who flew one flight where smoking was permitted, you would not expect that exposure to cause disease, would you, doctor?

A. I wouldn't expect that exposure to, but I would anticipate that there could be cumulative effects.

Q. But my point is you wouldn't expect -- there may be cumulative effects, but you would not expect one flight, one exposure to cause a disease in a flight attendant, would you?

A. No.

Q. You don't know whether 10 flights would cause disease, do you?

A. No, I don't know that.

Q. And in fact it's fair to say that you wouldn't know how many flights would be enough, right, doctor?

A. Well, there is the matter of response to dose, what you were suggesting earlier.

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Q. Right.
A. That the longer the exposure, it's more intense the exposure, the more likelihood there is of causation.
Q. I understand that. My point is that sitting here today with the information that you have, there's no way you could pinpoint when that exposure becomes enough, correct?
A. That's correct.
Q. You know, science recognizes the concept of permissible exposure levels or I think as you refer to it in your Surgeon General's Report threshold limit value, right?
A. That's correct.
Q. And in essence what that means is what we're talking about not every exposure causes disease, correct?
A. That's correct.
Q. Some exposure is just too small, right?
A. That's correct.
Q. And again, before you can ever conclude that a flight attendant who had heart disease got it from breathing secondhand smoke on planes as a physician you would have to go through all the risk factors, make that individual

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assessment, correct?

A. Yes, that's correct.

Q. While I'm on this page not really on the topic, there's some other conclusions in that report in addition to just heart disease and lung cancer, correct?

A. Yes.

Q. Conclusion 7, healthy adults exposed to environmental tobacco smoke may have small changes on Pulmonary Function Testing, but are unlikely to experience clinically significant deficits in pulmonary function as a result of exposure to environmental tobacco smoke alone. And then 10, the associations between cancer other than cancer of the lung and involuntary smoking require further investigation before a determination can be made about the relationship of involuntary smoking to these cancers, is that correct, sir?

A. Yes, that's correct.

Q. Emphysema, respiratory irritation are all multifactorial diseases, correct?

A. Yes.

Q. That means they can be caused buy lots of different things, right?

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A. That's correct.

Q. You told us generally in your direct testimony about instances where the tobacco industry made statements challenging your reports, challenging conclusions relating to smoking and disease, correct, sir?

A. That is correct.

Q. Now, you agree, don't you, doctor, that in this country people have a rate to express their views?

A. They do.

Q. And you gave us a specific example and thank you for reminding me of that, you said that you had asked representatives of the tobacco industry to tell you the additives they put in cigarettes and they wouldn't do it?

A. That's right.

Q. But of course the additives in cigarettes are proprietary, they go to distinguishing what makes one cigarette different from another, you're aware of that, right?

A. That's right.

Q. Smoking has been banned on domestic flights for 7 years, correct, doctor?

A. Yes.

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Q. Are you aware 1990 when the complete ban?

A. Started in '88 and became permanent in '90.

Q. Doctor, have you followed current issues regarding cabin air quality?

A. In a general way.

Q. In a general way. Are you aware that to this very day, 7 years after the ban, flight attendants are still complaining about cabin air quality?

A. I'm not fully aware of what their complaints are.

Q. Dr. Richmond, thank you very much. Appreciate it.

REDIRECT EXAMINATION

Q. Now, one of the studies that Mr. Cofer mentioned was a study dealing with nonsmoking passengers on airplanes.

In terms of your experience and knowledge, is there a difference between nonsmoking passengers who may take a flight every now and then and full-time fully employed flight attendants?

A. Yes, there's a significant difference.

Q. Who has the greater exposure?

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A. Well, the greater exposure is with those who are flying in those cabins frequently and daily in the case of flight attendants.

Q. You were asked questions about research about flight attendants in particular. Do you know whether or not the tobacco industry ever at any time conducted research on flight attendants in particular and compared those results with nonsmokers who developed lung cancer who were not flight attendants, to your knowledge did the tobacco industry ever conduct such research?

A. Not to my knowledge.

(Videotape ended.)

THE COURT: It's 12:15 you want to recess at this point?

MR. HUNTER: Yes, Your Honor.

VIDEOGRAPHER: It's 13 minutes long.

THE COURT: Did you want to recess now or just play the second tape? It's only 13 minutes.

MR. HUNTER: I'd like to make sure we publish the exhibit and we could play it now.

THE COURT: Is everybody okay for the next 15 minutes in.

MR. HUNTER: Your Honor, may I hand one of

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these to each of the jurors?

THE COURT: Yes.

MR. HUNTER: Your Honor, for the purposes of the record we'd like to make an announcement that this was the deposition of the defendant RJ Reynolds, deposition of defendant RJ Reynolds taken on February 26, 2001 in Winston-Salem, North Carolina.

THE COURT: Thank you.

(Videotaped testimony of Dr. Carr Smith was played as follows:)

A. Carr J. Smith.

Q. And what is your title with RJ Reynolds?

A. Master scientist and research and development.

Q. What's your educational background?

A. I have a bachelors degree in biology with a minor in chemistry from the University of South Alabama. I have a Ph.D. in molecular biophysics from Florida State University. And I'm a diplomat in the American Board of Toxicology.

Q. We've noticed RJ Reynolds by and through the person with the most knowledge concerning health effects of environmental tobacco smoke on

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occupants of airline cabins. Is that person you?

A. Yes.

Q. And what have you done to qualify yourself here at the company as the person most knowledgeable concerning health effects?

A. Conducted a number of human studies in collaboration with my colleagues and outside investigators and studied a significant amount of literature.

Q. What studies have you, what human studies have you done?

A. We've conducted or collaborated in three studies. One, a chamber study in an environmental room chamber in which human volunteers who were nonsmokers were exposed to 3.3 times the 95th percentile of environmental tobacco smoke and a number of physiological measurements were taken in that study.

We collaborated with the Verbont in Germany on a study which looked at markers of cardiovascular risk.

And we recently collaborated with the National Center for Thrombosis and hemostatsis at the University of North Carolina at Chapel

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Hill again on environmental tobacco smoke and cardiovascular study.

Q. Does environmental tobacco smoke cause disease in healthy nonsmokers?

A. I do not believe so.

Q. You disagree with the position taken by the Surgeon General?

A. That's correct.

Q. The National Academy of Sciences?

A. That's correct.

Q. American Lung Association?

A. That's correct.

Q. Is there any medical body that agrees with your position as set forth here on behalf of the tobacco company? Or are you kind of standing out there alone?

A. Well, there are quite a few prominent academic researchers who have shared many of the same concerns that we have.

Q. How many times have you given a deposition before today?

A. I've never given a deposition before today.

Q. Okay. Have you testified in a trial?

A. I've never done that.

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Q. How long have you been with the company?

A. 14 years I think.

Q. Who is, if you know, or who was, I don't know if he's alive or not, Alan Rodgman?

A. Dr. Rodgman is a retired RJ Reynolds scientist who was the director of the Fundamental Research Group.

Q. Let me show you Plaintiffs' Exhibit 3. Did we make copies of that?

VOICE: Yes.

A. Is this dated 1962? Is that what I'm looking at?

Q. I think it is.

VOICE: Let me just object to the use of Plaintiff's Deposition Exhibit 3 on the grounds that the exhibit appears to be incomplete.

Q. I don't have another copy of that, so do you mind if I come over and kind of read along with you?

VOICE: Here, I'll let you look at mine.

Q. Have you ever seen this document before?

A. No.

Q. Let me ask you to read starting at the last, second to last paragraph. It says: Although the major part of the sales of this

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company consists of cigarettes, what the company sells is cigarette smoke. Do you agree with that?

A. I know what Dr. Rodgman means. He means that from a chemical and physiology perspective that the person is not inhaling tobacco, they're inhaling cigarette smoke through the butt end of the cigarette.

I don't know, I mean, that's just a --

Q. He even underlines it.

A. I, yeah, he doesn't mean that they literally sell the smoke, he means that they sell cigarettes, but what the person is exposed to is cigarette smoke.

Q. What he actually says is he says what the company sells is cigarette smoke and then he underlines cigarette smoke.

A. Yeah, I mean, I've heard him say that before. And working on projects with him. And what he means is that the smoke is what the consumer actually intakes rather than the whole cigarette.

Q. Is he still with the company?

A. No, he's not, he's retired.

Q. He writes I guess back in 1962, so this is

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like a long time ago: During the past two decades cigarette smoke has been the target of a host of studies relating it to ill health and particularly to lung cancer. A majority of these studies incriminate cigarette smoke from a health standpoint. Do you agree that that was the state of affairs back in 1962?

VOICE: Let me just object to the form of the question.

Okay, can you answer it.

A. Well, what Dr. Rodgman is referring to is that in 1950 the first three epidemiology studies which reported an increased risk of lung cancer in active cigarette smokers were published. So what he's referring to is that the smoking and health issue as a public issue begins in 1950.

Now, prior to that there was a lot of nonscientific anecdotal reports of health risks associated with smoke, but they weren't in the form of peer-reviewed public studies. So that's what he's referring to.

Q. What he actually says here is during the past two decades cigarette smoke has been the target of a host of studies relating it to ill

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health. Now that would mean '62 back to '42.

A. Yeah, there weren't any really major publications back in the '40s. Like I said, 1950 is usually considered the initial date of kind of the scientific era of smoking and health research.

Q. Well, do you agree that as of 1962 the majority of the studies incriminated cigarette smoke from a health standpoint?

VOICE: Objection to the form of the question. Misstates the text of the document.

A. Well, I mean, the majority of studies conducted in any of the decades have reported cigarettes to be a risk factor for the major diseases that we talked about. So...

Q. Do you believe, is what he actually said here correct, that these studies incriminate cigarette smoke from a health viewpoint?

A. Well, I mean, they report -- a more accurate way to put it is that they report cigarette smoking to be a risk factor for a number of chronic diseases.

Q. Is sidestream smoke worse from a health standpoint than mainstream smoke?

A. Well, sidestream smoke in a real world, in

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other words, environmental tobacco smoke is a combination of sidestream -- aged and diluted sidestream smoke and exhaled mainstream smoke.

So at real world concentration levels it's extremely dilute. Now, if you want to go into a laboratory environment and generate super high concentrations of sidestream smoke which aren't really toxicologically relevant to the real world environmental tobacco smoke situation, you can find some compounds that are increased in concentration compared with smoke drawn through the butt end. But I don't think it really has any toxicological relevance towards disease risk due to the dilution effects involved.

Q. But if you were to study the components of equal volumes of sidestream versus mainstream, would there be more toxicity in the sidestream smoke?

A. I don't know if there's more toxicity because of that complex mixture problem. There are some compounds that are increased. I can't name them. But I know that there are compounds that have been reported to be rodent carcinogens in animal tests that are increased in sidestream smoke created under the artificial laboratory

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conditions. But that doesn't really mean that the overall mixture would be more toxic, because there are so many cases in which if you take whole families of compounds in or out of the smoke condensate, which is the tar fraction, that the overall toxicity is not changed even though the chemical composition is changed in a way that you might predict that it would, that the toxicity would change. But, see, the central thing you've got to remember is that there are an awful lot of chemicals within the complex mixture. And they react with each other so that they're not what they were originally before they interact, chemically react.

Q. How about nitrosamines, are there more nitrosamines in sidestream smoke than in mainstream?

A. I'm not really sure to tell you the truth. I've seen reports that say both ways, so I'm not sure exactly what that data says.

(Videotape ended.)

THE COURT: Thank you, I think that concludes the videotape testimony of Carr Smith. And this would be a good time to recess for lunch. It's 12:30. We're going be in recess

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until 1:45. Because I have a calendar at 1:30 in this courtroom which will be very brief. We'll be in recess until 1:45. Leave the documents and notebooks on your chairs and we'll collect them for you. Have a good lunch, we'll see you at 1:45.

(Jury exits courtroom.)

THE COURT: Before we recess, I have the rulings on the objections to --

MR. UPSHAW: Judge, I gave you a draft copy of Chad Ahrendt, there's quite a bit more.

THE COURT: It didn't say draft.

MR. UPSHAW: In my haste I handed it out very quickly in haste this morning, in fact they don't even have a copy.

THE COURT: Now I have to redo it.

MR. UPSHAW: I'll add the other ones if you want. We have an overall objection which you've now seen it, you'll understand our overall objection. We'll argue it whenever you want us to to whether it should be played at all. But there are several areas that have no relevance even if you decide there's something in there that's relevant.

THE COURT: You now pick up from page 52 or

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you're going to have additional? I have from page 7 to page 52 with objections, so you're going to have other objections?

MR. UPSHAW: There's only 56 pages in the entire deposition.

THE COURT: So it looks like you're going to have them intermingled.

MR. UPSHAW: Right.

THE COURT: When are you going to get those to me?

MR. UPSHAW: You can have my copy now.

THE COURT: You're giving me double work by doing this.

MR. UPSHAW: The reason why I gave that to you as early as possible, judge, they're not playing Mr. Ahrendt until Wednesday.

THE COURT: I had some time to do it. You handed it to me. I made copies.

MR. UPSHAW: I was trying to be quick.

THE COURT: I want to make sure I have all the objections to all the videotape testimony because that was supposed to be delivered to me today. Burns, Houston, Stroschein, Richmond, Fulton, Lumry, Smith, Berdi. And now I have Chad Ahrendt. Is there any other testimony that

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you are going to be offering by videotape testimony? Plaintiff?

MR. WILLIAMS: Not by video, but Wurmlinger.

THE COURT: The deposition you're going to read.

MR. WILLIAMS: Sections of Wurmlinger.

THE COURT: That was to be given to me today.

MR. REILLY: We'll give you our objections as soon as we come back from lunch.

MR. WILLIAMS: I have them somewhere, judge, I apologize. It's very short depo.

THE COURT: Wurmlinger with the objections, the additional objections to Ahrendt. Any other testimony that you're going to be offering either through videotape or through the deposition itself?

MR. WILLIAMS: Yes, judge, we may, the deposition of Dr. Stroschein taken, the discovery deposition. But not now, we'll do it in a couple of days. I don't know what they're going to object to. Most of the questions were asked by the Defendants.

THE COURT: I looked through the direct and

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the cross and the redirect.

MR. WILLIAMS: No, judge. They took a five-hour discovery deposition.

THE COURT: In between.

MR. WILLIAMS: Yes, in between and there are certain things in that deposition that I may need to play in the case. They did it.

THE COURT: Hand that to me then whatever it is you intend to introduce and they can respond with objections.

MR. REILLY: We will, Your Honor. When would you like our objections to this one?

THE COURT: Today.

MR. REILLY: Your Honor, it might take us a little bit of time since we just got this.

THE COURT: Today, we have a large stack as it is. This all should have been done prior to trial.

No other testimony that you're going to introduce other than live testimony, correct?

MR. WILLIAMS: Right.

THE COURT: What about as to the Defendants, any testimony that you are going to be, seeking to introduce either through videotape testimony or deposition testimony?

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MR. KODSI: No, Your Honor, there's the matter of when you ruled, when you handed us your rulings on Stroschein we didn't get any rulings on the redirect. I spoke with Mr. Williams, he and I were going to talk through it because I think some of the objections to Mr. Reilly's cross that you sustained would make the redirect beyond the scope. And also when we handed you that we just preserved all of Mr. Reilly's objections that were in the record.

THE COURT: So I didn't rule on the redirect.

MR. KODSI: But Mr. Williams and I might be able to save you some time if we can do that and he and I can talk before the end of court. It's two pages of testimony. But it's the redirect from August 9th of Dr. Stroschein.

I want to bring to the court's attention too and I don't know if there's a way to correct this, but there was a lot of colloquy in the videos while Your Honor was out of the room. And I don't know if there's a way that we can try to do a better job of editing the videos. I sent someone to watch the Richmond video and

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I'll talk to them about all the colloquy. It was represented to me there wasn't any in there. But the Carr Smith one we didn't have time to tell Your Honor. It was handed to me this morning, I saw three objections in there. But I'd like to try to prevent that from happening.

THE COURT: Part of that is my fault because when I initially went through the objections I actually was reading the transcripts and not looking at back and forth from the designations. And had I been more careful about that, I could have found which ones were colloquy and taken out those few lines. When I looked at the subject matter I was ruling on its admissibility without looking at the colloquies.

MR. REILLY: We've done this often enough, we know that the objections come out.

THE COURT: You also, Mr. Upshaw, you mentioned something about Brown and I don't know what that is.

MR. UPSHAW: We had filed a motion in limine with regard to Jason Brown which we discussed at our last pretrial conference. And basically reserved arguing on it because we

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didn't know if and when Mr. Brown was going to be called. At that time we were obviously pressed for time.

THE COURT: It's going to be contained in one of those notebooks?

MR. UPSHAW: Yes, I believe it is at the end of the notebooks. We said we weren't going to take it up until now. I don't know who they're calling this afternoon, I don't know if we need to bring it up when we return this afternoon from lunch or later.

MR. HUNTER: Well, we told you last week that we were going to call Jason Brown today.

MR. UPSHAW: Sure, so it will be this afternoon.

THE COURT: Now, we had reserved, Mr. Weinstein you were going to be making your presentation on your issue tomorrow?

MR. WEINSTEIN: Yes.

THE COURT: We'll have to reset that for Wednesday. Tomorrow we have to recess somewhat early.

MR. WEINSTEIN: No problem. I'll provide you today or tomorrow the cases so you can see ahead of time.

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THE COURT: And I would prefer if you have videotape testimony that you play tomorrow evening that would be helpful to me because I do have to leave early and I'd like to get some work done.

MR. UPSHAW: Can we find out who else this afternoon other than Mr. Brown?

MR. REILLY: They've given us the list of their people.

MR. UPSHAW: Order-wise, we have an idea of who it is just what order they're coming so we can be prepared.

MR. KODSI: One of the reasons, Your Honor, while you're flipping through that is we had also two motions in limine that applied to Ms. Anita Leone who might be testifying this afternoon. If she is, we'd need to raise that with Your Honor.

MR. HUNTER: I told you she would. I don't know how the time is going to go, I'm going to show Burns today. Call Jason Brown. Judge, they're killing me with this, I don't know the order.

THE COURT: You don't have to give them the order.

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MR. KODSI: We're not asking --

THE COURT: Sort of you are. Burns, Brown and who else for today?

MR. WILLIAMS: Lumry.

MR. HUNTER: Video. Anita Leone may testify today if we run short of time.

MR. WILLIAMS: That should probably take the whole afternoon, judge.

MR. UPSHAW: That's all I was asking for.

THE COURT: And you have objections to Leon and who else? And Brown. And Brown you've already raised in the motions in limine. Your objections to Leone you're going to do orally or do you have them in writing.

MR. KODSI: We have two motions in limine that apply to her, you reserved on them until the first witness showed up. There was an objection to exclude the factual testimony of other flight attendants about conditions aboard the aircraft because they're not substantially similar and. There's case law to support that. Even facts, some of the things Dr. Richmond said about some of the flight attendants having different exposures on different flights.

THE COURT: So your objection to Leone's

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testimony is going to be on that issue.

MR. KODSI: Right. And also there's a separate objection that we would like to exclude any reference in Ms. Leone's testimony of her having a condition called by environmental tobacco smoke which has absolutely no relevance in this case.

Those are the two motions in limine. They were generic and that's why we reserved until the first flight attendant was to show up to testify.

THE COURT: I do have those and I can go back and prepare.

Have a good lunch, 1:45.

(A recess was taken.)

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